

STATE OF MICHIGAN
COURT OF APPEALS

OSPREY EAST,

Plaintiff-Appellant,

v

MICHAEL BIBER, OSPREY S.A., LTD., DOUG
BLATT, JOHN BLATT, and CHARLES A.
PINKERTON, III,

Defendants-Appellees.

UNPUBLISHED
September 2, 2014

No. 313691
Livingston Circuit Court
LC No. 12-026604-CZ

Before: OWENS, P.J., and BORRELLO and GLEICHER, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

All lawyers know that deadlines are deadlines. All judges know that lawyers, like judges, sometimes make mistakes. Here, a one-day delay in filing a pleading led to a dismissal, which in turn triggered a second lawsuit. While I agree with the majority that the second case is virtually identical to the first and merits dismissal on that ground, I would reverse the trial court's grant of summary disposition in the earlier matter.

"Dismissal is a drastic step that should be taken cautiously," *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995), and "should be reserved for the most egregious violations of the court rules." *Schell v Baker Furniture Co*, 232 Mich App 470, 477; 591 NW2d 349 (1998). "Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Vicencio*, 211 Mich App at 506-507. A trial court's failure to evaluate other options on the record constitutes an abuse of discretion. *Id.* at 507.

The nonexhaustive list of factors a trial court must consider when dismissing a case, includes:

(1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Id.*, citing *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).]

The mistake made here was trivial. The stipulated order stated that “no additional parties shall be added to this litigation except by consent order filed prior to February 29, 2012 or upon leave of court after granting a motion filed prior to the same date.” The Webber entities filed their motion to amend their countercomplaint on February 29, 2012. This error hardly rises to the level of contumacious conduct. Moreover, the record does not support that the Webber entities willfully rather than accidentally misread the order, that the Webber entities refused to comply with previous orders, or that any party would have been prejudiced by the one-day delay in filing the amended counterclaim. Because the error did not warrant the ultimate sanction of dismissal, I respectfully dissent.

/s/ Elizabeth L. Gleicher